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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 346

VON DER AHE VAN LINES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In 1958, 1959 and 1960, petitioner, a common carrier by motor vehicle, transported household goods for the government between the United States and Germany. Each shipment moved under a single through bill of lading covering the entire transportation service from domestic origin to foreign destination. Petitioner's bills for the transportation were paid in full upon presentation, the latest bill being paid on September 17, 1959.

More than three years later, petitioner filed claims with the General Accounting Office for additional compensation, asserting that it had undercharged the United States by applying an incorrect rate to the land transportation in Germany. These claims were denied by the General Accounting Office on the basis of the provision in Section 322 of the Transportation Act of 1940, as amended, 49 U.S.C. 66, that "every claim cognizable by the General Accounting Office for charges for transportation within the purview of this section shall be forever barred unless such claim shall be received in the General Accounting Office within three years * * * from the date of * * * payment of charges for the transportation involved * * *."

Thereafter, on May 22, 1964—more than four-and-one-half years after the last payment by the government—petitioner instituted this action in the Court of Claims to recover the asserted undercharges. The court unanimously dismissed the suit on the ground that it was barred by the three-year statute of limitations in Section 204a(1) of the Interstate Commerce Act, 49 U.S.C. 304a(1). In so holding, the court found it unnecessary to reach the question whether that provision applied to petitioner by its own terms. Rather it pointed out that "the narrow issue to be decided here is whether under the particular facts of this case, [petitioner] has subjected itself to [these] time limitation provisions * * *" (Pet. App. 15; 358 F. 2d 999, 1000). The decision of the court below is correct and there is no occasion for review by this Court.

Section 204a(1) imposes a three-year limitation on "[a]ll actions at law by common carriers by motor vehicle subject to [Part II of the Interstate Commerce Act] for the recovery of their charges, or any part thereof * * *."[1] This limitations period has been expressly made applicable to "all transportation of property * * * on behalf of the United States in connection with any action brought before any court by or against carriers subject to" Part II of the Act. Section 204a(7), 49 U.S.C. 304a(7). Finding that petitioner was a "common carrier by motor vehicle subject to" the Act, the court below correctly held that it was bound by the time bar of Section 204a.

The court's finding was premised on the fact that each shipment was based on a through bill of lading (showing petitioner as both the origin and the destination carrier) covering the complete movement of the goods in question, and that each bill of lading referred to Military Rate Tender I.C.C. No. 4. This tender, published by petitioner's agent, expressly offered rates for transportation between the United States and Germany "pursuant to Section 22 of the Interstate Commerce Act [49 U.S.C. 22], or other appropriate statutory authority." Thus, the court found, the shipments in question were explicitly made "subject to" the Act[2] within the meaning of Section 204a. The Ninth Circuit reached a similar conclusion

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[1] It is not disputed that petitioner's claim accrued on the date of payment by the government. See 49 U.S.C. 304a(7).

[2] The provisions of Section 22 are made applicable to common carriers by motor vehicle by Section 217(b), 49 U.S.C. 317(b).

in an analogous situation (see *United States* v. *Francis*, 320 F. 2d 191, 195),[3] and no decision of any court is in conflict with these rulings.

Although the court below found it unnecessary to reach the question, we point out that, even in the absence of Military Rate Tender No. 4, petitioner would be covered by the statutory limitations period. Section 204a does not deal with the regulatory powers of the Interstate Commerce Commission; it concerns only actions at law for recovery of charges. Therefore cases limiting the Commission's jurisdiction to transportation taking place within the United States are inapposite. The sole question here is whether petitioner is a carrier "subject to" Part II of the Act. Part II, in terms, applies "to the transportation of * * * property by motor carriers engaged in interstate or foreign commerce * * *." Section 202(a), 49 U.S.C. 302(a). As defined in Section 203(a)(11), 49 U.S.C. 303(a)(11), "foreign commerce" includes transportation "partly by motor vehicle and partly by rail, express, or water * * * between any place in the United States and any place in a foreign country * * *." The shipments involved here—each under a through bill of lading covering the entire trip from

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[3] In *Francis* the court held that a carrier was subject to an action for restitution by the government under Section 322 of the Transportation Act of 1940, 49 U.S.C. 66, with respect to the transportation of merchandise wholly within a single State. Since those shipments, like the ones involved here, were made with reference to a rate quotation filed pursuant to Section 22 of the Act, the court ruled that the defendant was a "common carrier subject to the Interstate Commerce Act" within the meaning of Section 322.

the point of origin in the United States to the ultimate foreign destination—clearly were in foreign commerce within the purview of the Act. This is so even if, as petitioner appears to contend, "foreign commerce" is, for all purposes, limited to the portion of transportation taking place within the United States. Since the bills of lading involved here, which are the contracts upon which petitioner's action must be based,[4] clearly covered transportation of property in foreign commerce, petitioner cannot escape the fact that it is a carrier subject to the Act and therefore bound by the limitations period of Section 204a.

It should be noted that Section 204a(7), *supra*, was expressly designed to cure the inequitable and anomalous situation created by the application of different limitations periods to similar lawsuits. For example, it had been held that suits by carriers against the government were governed by the general six-year limitation in the Court of Claims Act (*Southern Pacific Co.* v. *United States*, 62 Ct. Cl. 391) but that suits by the government against carriers were governed by the two-year limitation in the Interstate Commerce Act. See S. Rep. No. 334, 85th Cong., 1st Sess., in 1958 U.S.C. Cong. & Admin. News 3925-3926. Section 204a alleviated this situation by providing a uniform, and relatively short, limitations period applicable to all carriers and shippers subject to the Act. See H. Rep. No. 2346, 85th Cong., 2d Sess.,

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[4] *St. Louis, I. Mt. & So. Ry. Co.* v. *Starbird*, 243 U.S. 592; *Johnson Motor Transport* v. *United States*, 149 F. Supp. 175 (Ct. Cl.); *United States* v. *Louisville & N.R.R. Co.*, 221 F. 2d 698 (C.A. 6).

p. 3; cf. 49 U.S.C. 66. Petitioner would now create a new anomaly by applying the Interstate Commerce Act's three-year limitation to suits based on the domestic portion of contracts of carriage from this country to another and the Court of Claims Act's six-year limitation, in suits *against* the government.[5] for the foreign portion of the same cause of action. Such a result is plainly contrary to the purpose of Section 204a.

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

AUGUST 1966.

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[5] Under petitioner's theory suits *by* the government for overcharges with reference to the foreign portion of a single through shipment apparently would not be subject to any statute of limitations whatever. In suits between private parties, it is unclear what limitations period would apply to the foreign part of a through shipment.

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Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The petition herein seeks review of a decision of the United States Court of Claims applying the three-year statute of limitations set forth in Section 204 a of the Interstate Commerce Act, 49 U.S.C. §304 a, to a claim for transportation performed for respondent in a foreign country. The pertinent jurisdictional provisions, statutes involved, the facts of the case, and the opinion of the Court below are set out in our petition. This reply is directed solely to the contents of respondent's Memorandum in Opposition.

Petitioner respectfully represents, as detailed below, that rather than detracting from our petition, respondent's Memorandum in Opposition demonstrates the untenable character of the decision below, and corroborates the need for consideration by this tribunal of the issue involved.

1. First, it is apparent that respondent finds itself unable to defend the decision below on the rationale upon which the decision was based. As respondent at first recognizes (Memorandum in Opposition, p. 2), the Court of Claims did not hold that Section 204 a of the Interstate Commerce Act applied by its terms to the subject transportation, but rather that petitioner had subjected itself to this limitations provision by reason of its participation in a so-called "Section 22" quotation. Nevertheless, respondent states that the decision below was correct *because "petitioner was a 'common carrier by motor vehicle subject to' the Act."* (Memorandum in Opposition, p. 3). The Court of Claims, we point out, *expressly refused* to decide the case on this ground, *i. e.*, the Court refused to hold, as respondent had also urged below, that Section 204 a applied to all actions at law brought by motor carriers for the recovery of their freight charges. (R. 63). As to the merits of respondent's statement, we repeat, as stated in our petition, that the provisions of the Interstate Commerce Act do not apply to transportation performed outside of the United States, and that petitioner was not a common carrier subject to the Act insofar as the present suit is concerned, which is limited to a claim for transportation performed in a foreign country.

All that respondent is able to state in defense of the rationale of the Court below is that "the Ninth Circuit reached a similar conclusion in an analogous

situation (see *United States v. Francis*, 320 F.2d 191, 195), and no decision of any Court is in conflict with these rulings." (Memorandum in Opposition, pp. 3-4).

First, we submit that the *Francis* case, *supra*, is not only wrong, but is inexplicable. The question presented in *Francis*, as there stated by the Court, was "whether or not appellant [the United States] could bring an action for restitution under Section 322 of the Transportation Act of 1940." (*Ibid.*, p. 195). After noting the appellee-carrier's contention that section 322 did not apply because the transportation involved was strictly intrastate transportation, the Court concluded that "by becoming a party to the Loretz [section 22] quotation, appellee must be considered to be within the meaning of the section 322 phrase 'common carrier subject to the Interstate Commerce Act' [and that] appellee . . . has waived any claim he is excluded under section 322." (*Ibid.*, p. 195). Aside from the merits of this rationale (see our Petition, pp. 7-8), the Court appears oblivious to the fact that Section 322 of the Transportation Act of 1940, 49 U.S.C. 66, applies only to the administrative handling of claims before the General Accounting Office, *and has nothing whatever to do with actions at law.*

This was in fact recognized by the Court of Claims only a month after the present case was decided (See *Iran National Airlines Corporation v. United States*, Ct. Cl. No. 241-64, decided May 13, 1966), and we are, consequently, at a complete loss to understand the reliance which the Court of Claims placed on the *Francis* case in the case at bar.

Second, it is simply not true that "there is no decision of any Court in conflict with the *Francis* case and the decision herein." (Memorandum in Opposition, p. 4). In our petition, we cited, *inter alia*,

the case of *Thompson, Trustee, Great Northern R.R. Co. v. Millwhite Company*, 292 S.W. 2d 148 (1956), which is in *direct* conflict with both of these cases. (Petition, p. 7).

2. After abandoning the rationale relied upon by the Court below, respondent proceeds to argue that petitioner was a carrier subject to Part II of the Act since the transportation here involved was "in foreign commerce." (Memorandum in Opposition, pp. 4-5). When scrutinized, respondent's argument is revealed to be absolute "double talk." First, respondent quotes Section 203(a)(11) of the Interstate Commerce Act, 49 U.S.C. §303(a)(11), wherein the term "foreign commerce" is defined, but respondent conveniently omits to include the last portion of this provision reading "insofar as such transportation takes place within the United States." (Memorandum in Opposition, p. 4).[1] (See also letter from the Interstate Commerce Commission to Senate Committee on Interstate and Foreign Commerce, appended to Senate Report No. 2258, 81st Cong., 2d Sess. (1950)). Respondent then proceeds to argue that the shipments here involved "clearly were in foreign commerce within the purview of the Act." (Memorandum in Opposition, pp. 4-5). Respondent states:

> "This is so even if, as petitioner appears to contend, 'foreign commerce' is, for all purposes, limited to the portion of transportation taking place within the United States. Since the bills of lading involved here, which are the contracts upon which petitioner's action must be based, clearly covered transportation of property in foreign commerce, petitioner cannot escape the

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[1] The full text of this provision is set out at page 11 of our petition.

> fact that it is a carrier subject to the Act and therefore bound by the limitations period of Section 204a." (Memorandum in Opposition, p. 5).

It is difficult for us to conceive of a better example of "double talk." As set forth in our Petition, Section 202(a) of the Interstate Commerce Act provides "that the provisions of this part [which encompasses Section 204a, the subject limitations provision] apply to transportation. . . in interstate or foreign commerce: . . ," and Section 203(a)(11) then defines "foreign commerce" as "commerce. . . between any place in the United States and any place in a foreign country. . . *insofar as such transportation takes place within the United States.*" (See Petition, pp. 4-5). There is no doubt that the shipments involved herein were in "foreign commerce" within the ordinary meaning of that term. They were not, however, in "foreign commerce" as that term is used in the Interstate Commerce Act. It should be so obvious at this late date as not to require statement that the provisions of the Interstate Commerce Act apply to transportation in foreign commerce *only to the extent that such transportation is performed within the United States*. Respondent, however, apparently does not accept this proposition.

3. Lastly, respondent argues that Section 204 a was designed to cure the anomaly created by the application of a six-year statute of limitations to suits against the Government, and a two-year limitations period to suits by the Government against carriers, and that:

> "Petitioner would now create a new anomaly by applying the Interstate Commerce Act's three-year limitation to suits based on the domestic portion of contracts of carriage from this country